Classical Malice: A New Fault Standard for Defamation in Fiction

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I. INTRODUCTION

The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech."[1] Although the Constitution provides for the protection of free speech, this right is not unfettered. The courts have placed limitations on free speech in areas in which the freedom of speech of one individual significantly encroaches upon the rights of another individual. For example, the Court has limited freedom of speech in cases involving obscenity[2] and fighting words.[3] These cases demonstrate the willingness of the Supreme Court to grant different levels and types of protection to different categories of communication.

Defamation is another area in which freedom of speech has encountered limitations. The law of defamation is aimed at protecting the plaintiff's reputation.[4] In defamation cases, courts face the tension between a speaker's freedom of speech and the reputational interests of a plaintiff. As in obscenity

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[1] U.S. CONST. amend. I.

[2] In Miller v. California, 413 U.S. 15 (1973), the Supreme Court presented a three-pronged test to determine whether obscene speech deserved Constitutional protection. This test probed whether: (1) the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; (2) the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (3) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. *Id.* This test illustrates the Court's willingness to grant less protection to speech that meets this test for obscenity.

[3] The origin of the fighting words doctrine is Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). In *Chaplinsky*, the Supreme Court defined fighting words as "those which by their very utterance inflict injury or tend to incite an immediate breach of peace." *Id.* at 572. The Court decided that such words were "no essential part of any exposition of ideas" and of "slight social value." *Id.* The Court subsequently placed some limitations on the doctrine. *See, e.g.*, Cohen v. California, 403 U.S. 15 (1971); Cox v. Louisiana, 379 U.S. 536 (1965); Terminiello v. Chicago, 337 U.S. 1 (1949).

[4] Afro-American Pub. Co. v. Jaffe, 366 F.2d 649, 658 (D.C. Cir. 1966) (stating that the law of libel protects the interest in reputation which is "inherent in the essential dignity and worth of every human being"); *see also* Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 49 (1971); Polygram Records, Inc. v. Superior Court of Napa County, 70 Cal. App. 3d 543, 549 (1985); Phillips v. Evening Star Newspaper, 424 A.2d 78, 87 (D.C. 1980).

and fighting words cases, courts have had some success in fashioning workable standards to measure these competing interests in defamation cases.[5]

Defamation in fictional works presents a particularly thorny problem for the courts. Defamation in fiction refers to situations in which a real person allegedly is defamed through the use of that person's name or personality in the development of characters within a fictional work. "Fiction" is a distinct category of communication and necessarily must be approached differently than political advertisements, newspaper articles, or other fact-based vehicles of expression. Should fiction receive any First Amendment protection at all? Should the courts craft a different level of protection for fiction than for other categories of communication? The author of fiction has clearly created a work predicated on imagination—the writer's work does not purport to be factual. The very essence of fiction implies an escape from fact or reality. As such, it would seem impossible to sustain successfully a libel action for defamation in fiction, because the work itself does not purport to be a statement of reality. However, courts have recognized that it is indeed possible for a plaintiff to be defamed through a fictional medium.[6] Courts have struggled to devise a workable standard to accommodate the nuances that are unique to defamation in fiction.[7] No single test has proved satisfactory in handling fiction in general. In addition, the various genres that emerge within the broad category known as fiction pose additional challenges in applying a single workable standard.[8]

This Article proposes a new approach for defamation in fiction which advocates the use of a classical malice fault standard. The term "classical malice" refers to the common-law definition of malice as "spite" or "ill will."[9]

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[5] Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); New York Times v. Sullivan, 376 U.S. 254 (1964); *see infra* Part II.

[6] *E.g.*, Geisler v. Petrocelli, 616 F.2d 636 (2d Cir. 1980); Bindrim v. Mitchell, 155 Cal. Rptr. 29 (Cal Ct. App.), *cert. denied*, 444 U.S. 984 (1979); Corrigan v. Bobbs-Merrill, Co., 126 N.E. 260 (N.Y. 1920).

[7] *See* cases cited *supra* note 5.

[8] *See infra* notes 11–13 and accompanying text.

[9] State courts have often confused the definitions of classical malice and constitutional malice because both types of malice have been interchangeably labeled "actual malice." For a definition of constitutional malice, see *infra* note 10 and accompanying text. State courts have attempted to clarify the difference between these terms:

> We note at the outset that the concept of actual malice in public-official defamation cases involving media defendants should not be confused with the traditional common-law standard of actual malice. In the common law, actual malice connotes ill-will, hatred, a spirit of revenge, or a conscious disregard for the rights and safety of other persons which has a great probability of causing substantial harm.

This definition is distinguishable from the constitutional malice standard defined in the watershed case of *New York Times v. Sullivan*.[10] The classical malice fault standard alleviates the inadequacies of the current fault standards that courts apply to defamation in fiction. The classical malice fault standard will yield the best results, whether applied to pure fiction, "faction,"[11] *roman a clef*,[12] or docudrama.[13] With the exception of absolute First Amendment protection for authors and other creators of fiction, the classical malice standard affords the greatest protection for the author's freedom of speech.

II. THE CURRENT STATUS OF THE LAW OF DEFAMATION AND ITS ROOTS IN THE COMMON LAW

The current status of the law of defamation is not equipped to diffuse the difficulties that arise from defamation in fiction. To understand the inadequacies of the present state of the law, one must analyze the evolution of common-law libel.

Varanese v. Gall, 518 N.E.2d 1177, 1180 (Ohio 1988); *see also* Burnett v. National Enquirer, Inc., 193 Cal. Rptr. 206, 215 (Cal. Ct. App. 1983); Silbowitz v. Lepper, 299 N.Y.S.2d 564, 566 (1969); Jacobs v. Frank, 573 N.E.2d 609, 612 (Ohio 1991).

[10] 376 U.S. 254 (1964). Constitutional malice was defined by the Supreme Court as "knowledge of falsity" or "reckless disregard thereof." *Id.* at 286–87 Hereinafter, the term "classical malice" will be used to refer to "ill will" and the term "constitutional malice" will be used to refer to the *New York Times* malice standard.

[11] The genre of "faction" uses names of famous people, many of whom are still living, but asserts that it is placing them in fictitious situations. One scholar defines the novel of faction as one that "adheres fairly closely to historical fact as a foundation for psychological speculation about—or 'mythologizing' of—the real persons and events it describes." Isidore Silver, *Libel, The "Higher Truths" of Art, and the First Amendment*, 126 U. PA. L. REV 1065, 1067 n.10 (1978). Silver suggests that Alex Haley's *Roots* may have inspired the term.

[12] The *roman a clef* is "a novel that represents historical events and characters under the guise of fiction." THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1242 (1967).

[13] A docudrama is defined as a theatrical, television, or motion picture production that uses real people as central characters "to enhance the impact of, and lend credibility to, the fictionalized events." David A. Anderson, *Avoiding Defamation Problems in Fiction*, 51 BROOK. L. REV. 383, 393 n.57 (1984) (citing Victor A. Kovner, *The Great Docudrama Controversy—Elizabeth Taylor and ABC*, 1 COMM. & L. 1 (1983)).

Docudramas are distinguishable from documentaries. A documentary is "a non-fictional story or series of historical events portrayed in their actual location; a film of real people and real events as they occur. A documentary maintains strict fidelity to fact." Davis v. Costa-Gavras, 654 F. Supp. 653, 658 (S.D.N.Y. 1987).

A. *Defamation at Common Law*

To sustain a libel action at common law, the plaintiff had to prove that defendant: (1) published;[14] (2) a defamatory statement;[15] (3) of and concerning the plaintiff.[16] The important distinction between the common-law requirements for libel and the current constitutional requirements for defamation rests in the absence of a fault standard at common law. At common law, if a plaintiff could prove that the defendant had published a defamatory statement of and concerning the plaintiff, he or she could sustain a libel action without any proof of fault by the defendant.[17]

The common-law case of *Corrigan v. Bobbs-Merrill, Co.*[18] illustrates the no-fault standard as applied to a work of fiction. In *Corrigan*, the court refused to recognize defendant publisher's assertion that it had no actual intent to defame plaintiff. The court stated:

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[14] Publication of defamatory matter is communication, intentionally or by a negligent act, to one other than the person defamed. RESTATEMENT (SECOND) OF TORTS § 577 (1989). This definition of publication emphasizes that defamation is a three-party tort.

[15] The determination of what is defamatory depends largely upon context. Under the early common-law formulation, the defamatory utterance was any utterance that would hold the plaintiff up to "public ridicule, obloquy or contempt." *See, e.g.*, Sweeney v. Schenectady Union Pub. Co., 122 F.2d 288, 290 (2d Cir. 1941); Berg v. Printers' Ink Pub. Co., 54 F. Supp. 795, 796 (S.D.N.Y. 1943); Holden v. American News Co., 52 F Supp. 24, 31 (E.D. Wash. 1943); Sweeney v. Caller-Times Pub. Co., 41 F. Supp. 163, 169 (S.D. Tex. 1941). More recent formulations state that a statement is defamatory if it "tends to diminish the esteem, respect, goodwill, or confidence in which the plaintiff is held, or if it tends to excite adverse, derogatory, or unpleasant feelings or opinions about the plaintiff." *Davis*, 619 F. Supp. at 1375.

[16] A modern formulation of this common-law requirement exists in the *Restatement*. "A defamatory communication is made concerning the person to whom its recipient correctly, or mistakenly but reasonably, understands that it was intended to refer." RESTATEMENT (SECOND) OF TORTS § 564 (1989).

[17] *E.g.*, Corrigan v. Bobbs-Merrill, Co., 126 N.E. 260 (N.Y. 1920); *see infra* notes 18–20 and accompanying text.

[18] 126 N.E. 260 (N.Y. 1920). In *Corrigan*, plaintiff, New York magistrate, Joseph E. Corrigan, brought a libel action against the publisher of a novel entitled *God's Man*, which offensively depicted a magistrate named "Corningan." The novel portrayed "Corningan" as an associate of low and depraved character, with the following description of the character appearing in a chapter entitled "Justice - a la Corigan" (another variation in spelling that appeared in the novel) in the table of contents: "ignorant, brutal, hypocritical, corrupt, shunned by his fellows, bestial of countenance, unjust, dominated by political influences in making decisions, and grossly unfit for his place." *Id.* at 262.

> The fact that the publisher has no actual intention to defame a particular man or indeed to injure any one does not prevent recovery of compensatory damages by one who connects himself with the publication . . . . The question is not so much who was aimed at as who was hit . . . . Just as the defendant could not excuse himself from malice by proving that he wrote it in the most benevolent spirit, so he cannot show that the libel was not of and concerning the plaintiff by proving that he never heard of the plaintiff.[19]

The absence of a fault standard at common law essentially made libel a strict liability tort for purposes of recovering compensatory damages.[20]

As the law of defamation evolved, the Supreme Court recognized that a no-fault standard was not attractive, particularly when reviewed in tandem with free speech considerations. A strict liability approach was an impediment to the author's right to express his or her ideas. It became clear that the no-fault standard would stifle the artist's desire to publish his or her creations because the common-law no-fault standard had facilitated the success of libel actions. The court in *Clare v. Farrell*[21] emphasized this notion: "At least some latitude must be given authors in their selection of names for characters so that the production of fictional literature may continue, and the mean, the base, and the good of the characters therein fearlessly portrayed."[22]

Without some greater protection afforded authors, self-censorship would necessarily spring up in the literary community.[23] Creators of fiction would be prevented from sharing their creations with others as the result of apprehensions of defending oneself in potential libel actions. The First Amendment was designed to protect the free exchange of ideas and prevent such chilling effects on freedom of speech.[24]

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[19] *Id.* at 261.

[20] Donald Meltzer, Note, *Toward a New Standard of Liability for Defamation in Fiction*, 58 N.Y.U. L. REV. 1115, 1126 (1983).

[21] 70 F. Supp. 276 (D. Minn. 1947).

[22] *Id.* at 279.

[23] Herbert v. Lando, 441 U.S. 154, 159 (1979) ("These cases rested primarily on the conviction that the common law of libel gave insufficient protection to the First Amendment guarantees of freedom of speech and freedom of the press and . . . to avoid self-censorship . . . ."); Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) (concluding that strict liability, which compels a publisher to guarantee the accuracy of his factual assertions, may lead to "intolerable self-censorship"); Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 50 (1971) ("Fear of guessing wrong must inevitably cause self-censorship and thus create a danger that the legitimate utterance will be deterred.").

[24] Time Inc. v. Hill, 385 U.S. 374, 401 (1967) (Douglas, J., concurring) ("Once we narrow the ambit of the First Amendment, creative writing is imperiled and the 'chilling effect' on free expression . . . is almost sure to take place."); *see also* Dombroski v. Pfister,

B. *The Constitutionalization of a Fault Standard*

In 1964, in response to the stifling effect of strict liability on the free exchange of ideas, the Supreme Court decided *New York Times v. Sullivan*.[25] In *New York Times*, the Supreme Court rejected strict liability and introduced a fault standard into the law of defamation. The Court concluded that a public official suing for defamation must prove constitutional malice.[26] The plaintiff must show that the author knew that his or her statement was false,[27] or that he or she acted with reckless disregard for the truth or falsity of his or her statement.[28] This standard was later extended to include "public figures."[29]

In addition to the application of the *New York Times* constitutional malice standard to public officials, the Court devised a standard of fault for private plaintiffs suing for defamation. In *Gertz v. Robert Welch, Inc.*,[30] the Supreme Court again rejected strict liability as too burdensome on the media. The private plaintiff was required to prove that the publisher or broadcaster had negligently published a false and defamatory statement.[31]

New York Times and *Gertz* made strides toward greater protection for the author's right to free speech. *New York Times* catalyzed procedural changes in the law of defamation that created a larger hurdle to plaintiff's success.[32]

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380 U.S. 479, 487 (1965); Naantaanbuu v. Abernathy, 816 F. Supp. 218, 228 (S.D.N.Y. 1993); Government Group of Seal Beach, Inc. v. Superior Court, 585 P.2d 572 (Ca. 1978).

[25] 376 U.S. 254 (1964).

[26] *Id.* at 286–87. In Beckley Newspapers Corp. v. Hanks, 389 U.S. 81 (1967), the Court emphasized the distinction between the *New York Times* test of knowledge of falsity or reckless disregard for the truth and actual malice in the traditional sense of ill will.

[27] *Beckley Newspapers Corp.*, 389 U.S. at 81.

[28] *Id.* Reckless disregard is not as clearly identifiable as knowledge of falsity. The first case that attempted to define reckless disregard was St. Amant v. Thompson, 390 U.S. 727 (1968). In *St. Amant*, the Court held that there must be sufficient evidence to permit the conclusion that defendant in fact entertained serious doubts as to the truth of his publication. *Id.* The Court equated "reckless disregard" for the truth with "subjective awareness of probable falsity." *Id.* at 731.

[29] Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).

[30] 418 U.S. 323 (1974).

[31] *Id.*

[32] New York Times v. Sullivan, 376 U.S. 254 (1964) mandated procedural changes for defamation actions, in addition to the substantive change of establishing a fault standard. Procedural changes included: (1) At common law, defendant had the burden of proving the truth of the utterance. Under *New York Times*, the burden of proof shifted to plaintiff. *Id.* at 281. (2) At common law, the quantum of proof was a preponderance of the evidence. Under *New York Times*, fault must be proven with convincing clarity. *Id.* at 285–86. (3) At

Although the *New York Times* and *Gertz* standards afford greater protection for free speech than did the common law, these standards are not appropriate when applied to defamation in the context of fiction. Both the *New York Times* and *Gertz* opinions resulted from actions brought against media defendants. In addition, the rules of *New York Times* and *Gertz* were created to protect political speech, not creative fiction.[33] The fault standards of *New York Times* and *Gertz* are not successfully transferred to defamation in fiction.

III. IDENTIFYING THE PROBLEMS OF DEFAMATION IN FICTION

The most formidable stumbling block for defamation in fiction is the lack of a suitable fault standard specifically tailored to fiction cases. This problem is largely a definitional one. Fiction is really a middle ground between truth and falsity.[34] The *New York Times* standard focuses on the author's knowledge of the truth or falsity of his or her statement. Under *New York Times*, defendant's knowledge of falsity gives rise to liability under the constitutional malice fault standard.[35] Yet, ironically, fiction is inherently based on falsehood. The author of fiction knows that he or she is writing something "false." Indeed, the reader

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common law, appellate review was based on a clearly erroneous standard. Under *New York Times*, appellate review is de novo. *Id.* at 295.

[33] In *New York Times*, the Commissioner of the Montgomery Police Department brought a libel action against *The New York Times* alleging that he was defamed by an advertisement that appeared in defendant's newspaper. *New York Times*, 376 U.S. at 256. The advertisement was a political advertisement that criticized the police force in Montgomery, Alabama and stated that the police had terrorized Martin Luther King, Jr. and his followers. Although plaintiff's name was not contained in the advertisement, plaintiff contended that the criticism of the police implied harm to his reputation as Commissioner. The United States Supreme Court found for defendant because plaintiff had failed to prove constitutional malice. The subject of the work was a political advertisement, not a work of fiction.

In *Gertz*, plaintiff filed a defamation claim against a magazine, *American Opinion*, which labeled Gertz as a "Leninist" and a "Communist-fronter." *Gertz*, 418 U.S. 323 (1974). The article stated that Gertz had been an officer in the National Lawyer's Guild, described as a Communist organization that "probably did more than any other outfit to plan the Communist attack on the Chicago police during the 1968 Democratic Convention." *Id.* at 326.

[34] "All fiction, by definition, eschews an obligation to be faithful to historical truth. Every fiction writer knows that his creation is in some sense false." Miss America Pageant, Inc. v. Penthouse Int'l, Ltd., 524 F. Supp. 1280, 1285 (D.N.J. 1981); Guglielmi v. Spelling-Goldberg Prods., 603 P.2d 454, 461 (Ca. 1979). *See generally* R. Bruce Rich & Livia D. Brilliant, *Defamation-in-Fiction: The Limited Viability of Alternative Causes of Action*, 52 BROOK. L. REV. 1, 6 (1986).

[35] *New York Times*, 376 U.S. 2541.

of fiction likewise knows that he or she is reading a work which does not purport to be true. The *New York Times* test immediately triggers liability based on the author's knowledge of falsity, while falsity or creation of illusion is itself the heart of fiction. In response, courts and commentators have suggested a variety of approaches in resolving the defamation in fiction conflict. Two of these approaches are discussed below.

A. *Fiction as False Speech*

Because fiction is inherently false in nature, perhaps fictional works should simply be treated as false speech. If fiction is to be treated as false speech, the application of the *Gertz* and *New York Times* standards to fiction would seem appropriate. As the Court in *Gertz* stated: "There is no constitutional value in false statements of fact."[36] Under the *Gertz* and *New York Times* tests, such false speech is not afforded constitutional protection. This proposition that fiction is false speech and thus unprotected by the Constitution has a devastatingly chilling effect on free speech and the open exchange of ideas.

This approach was followed by the court in *Bindrim v. Mitchell*.[37] In *Bindrim*, plaintiff psychologist sued defendant for defamation based upon the author's portrayal of plaintiff conducting nude group therapy sessions in a book called *Touching*. Plaintiff alleged that he was injured by defendant's inaccurate portrayal of the event, including plaintiff's use of obscene language which plaintiff claimed he did not in fact use. Defendant asserted that *Touching* was a fictional novel, thus insulating her from liability for libel. The *Bindrim* court found for plaintiff and reasoned that fiction is, by definition, untrue. Defendant attended the session and was aware of the events which occurred. The court therefore reasoned that she had written the novel with actual malice, possessing knowledge of falsity or reckless disregard thereof.[38] Thus, defendant met the fault standard of *New York Times*.

This approach yields poor results. Fiction does not fit neatly into the category of false speech. Such a characterization strips fiction of any First Amendment protection. Under this formulation, all fiction would meet the constitutional malice test of *New York Times* because it is predicated on imagination. One commentator aptly presents a distinction between fiction and falsehood: "[W]hile falsehood is presented in the guise of a literal rendering of reality, fiction is not."[39]

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[36] *Gertz*, 418 U.S. at 339–40.

[37] 155 Cal. Rptr. 29 (Cal. Ct. App.), *cert. denied*, 444 U.S. 984 (1979).

[38] *Id.*

[39] Diane L. Zimmerman, *Real People in Fiction: Cautionary Words About Troublesome Old Torts Poured Into New Jugs*, 51 BROOK. L. REV. 355, 361 (1984).

Advocates of the "false speech" approach will argue that fiction is predicated on some higher form of reality. In some instances, reality does indeed have an effect on the author's portrayal of fiction. Virtually all writers rely to some extent on personal experience for their material—real people who are part of the author's creative experience inevitably play a role in their work.[40] F. Scott Fitzgerald used "real" persons[41] in his classic novel, *The Great Gatsby*.[42] Mark Twain wrote *Huckleberry Finn*[43] and *The Adventures of Tom Sawyer*[44] drawing from memories of his childhood home, Hannibal, Missouri. Fellow writers were used by Charles Dickens as models for his characters in *Bleak House*.[45] Scholar Frederick Schauer appreciated the richness of the interface between fiction and reality when he wrote:

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[40] Literary movements have even focused on the use of reality in crafting literature. The late nineteenth century movement of "realism" encouraged a specific connection between the "real" world and the world of the story. ROBERT SCHOLES & ROBERT KELLOGG, THE NATURE OF NARRATIVE 86 (1966). Critics Scholes and Kellogg observed, "Robinson Crusoe is not a real individual but he is an attempt to present an individual whose most important attribute is that he may pass for real." *Id.* at 87.

See also DORIS ALEXANDER, CREATING CHARACTERS WITH CHARLES DICKENS (1991); ROBERT ALTER, MOTIVES FOR FICTION (1984); MORROE BERGER, REAL AND IMAGINED WORLDS (1977); ZULFIKAR GHOSE, THE FICTION OF REALITY (1983); HERBERT LINDENBERGER, HISTORICAL DRAMA, THE RELATION OF LITERATURE AND REALITY (1975); THOMAS F. PETRUSO, LIFE MADE REAL, CHARACTERIZATION IN THE NOVEL SINCE PROUST AND JOYCE (1991).

[41] H.D. PIPER, THE GREAT GATSBY: THE NOVEL, THE CRITICS, THE BACKGROUND 171–97 (1970) *cited in* Silver, *supra* note 11 at 1067 n.10.

[42] F. SCOTT FITZGERALD, THE GREAT GATSBY (1st Macmillan/Hudson River ed. 1988) (1925).

[43] MARK TWAIN, HUCKLEBERRY FINN (Nelson Doubleday 1970) (1885).

[44] MARK TWAIN, THE ADVENTURES OF TOM SAWYER (Pendulum Press 1973) (1876).

[45] CHARLES DICKENS, BLEAK HOUSE (Norman Page ed., Penguin Books 1971) (1853). At least four familiar fellow writers were used as models for the characters of *Bleak House*. The poet Samuel Rogers represented the character of Grandfather Smallweed, the monstrous old moneylender. ALEXANDER, *supra* note 40. The character of Krook was "borrowed" from the characteristics of playwright John Poole. *Id.* at 40. Dickens's old friend, Leigh Hunt, was represented as character Harold Skimpole. *Id.* at 42. The physique and personality of poet John Kenyon were embodied in the character of Reverend Mr. Chadband. *Id.* at 48.

Dickens's acquaintance with Dutch writer Hans Christian Anderson is reflected in his autobiographical novel, *David Copperfield*. CHARLES DICKENS, DAVID COPPERFIELD (Nina Burgis ed., Penguin Books 1981) (1850). Anderson is portrayed through the character of Uriah Heep, while David Copperfield embodies the author himself. ALEXANDER, *supra* note 40, at 78.

> A great deal of fiction trades precisely on the way in which fictional representations are hooked onto the real world. *The Grapes of Wrath* would not have been the novel it was had it not been for the existence of real dust bowls, real hunger and real "Okies." Our reaction to *A Tale of Two Cities* would have been quite different had there been no French Revolution.[46]

Elements of reality are often used as a tool to make a work of fiction more believable.

Even though a reader knows that he or she is reading a work of fiction, one might argue that such fiction still has a great impact on the reader's perception of reality. A reader's once romanticized perception of life at sea may be forever tarnished upon reading about Ishmael's hardships in *Moby Dick*.[47] While fiction may have an impact on shaping one's perception of reality, it is nonetheless improper to classify fiction as false speech. Works of fiction are not ultimately created with the purpose of conveying literal truth. As critic Diane L. Zimmerman wrote: "The readers of fiction . . . recognize that even those bits of reality tucked into a novel or play are subtly altered by their presence in the fictional universe; thus, 'fictional' reality is taken out of the realm of literal truth."[48]

A distinction exists between fictional reality and literal reality. There are three primary reasons why courts must recognize this distinction and protect the interests of the author.

1. *The Reader's Perceptions*

The reader's expectations and perceptions play a large role in the tension between the interests of the reader and the author. The author's ability to change a reader's perception about reality is indeed a powerful ability. Nonetheless, a reader's changed perceptions of reality are not grounds for nonprotection of fiction.

"The readers of fiction, at least if they are reasonable, do not bring to a novel the same expectations and assumptions that they bring to their morning newspapers."[49] The reader of fiction comes to the novel with the expectation that he or she is "suspending disbelief" and entering a world of imagination.[50]

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[46] Frederick Schauer, *Liars, Novelists and the Law of Defamation*, 51 BROOK. L. REV 233, 261 (1984) (footnotes omitted).

[47] HERMAN MELVILLE, MOBY DICK (Raintree Publishers 1982) (1851).

[48] Zimmerman, *supra* note 39, at 361.

[49] *Id.*

[50] *See infra* notes 88–89 and accompanying text.

This expectation is strongest for "pure fiction," but it is also present for the *roman a clef* scenario.[51] Real persons may be used as models for characters, but the characters are presented in a mode of fiction. If the reader's perception changes as a result of reading, the author should not be held accountable for that change when his or her work has purported to be fiction. For example, although the reader of Mitchell's *Touching* may have changed his perception of Dr. Bindrim upon reading the novel, the work was clearly fictional in nature and presented no conveyance of literal truth.[52] If a work is clearly fictional and does not purport to be otherwise, authors must not be punished for being good at what they do—for telling a believable story.

The author's power to affect a reader's perceptions undoubtedly impacts the tension between defendant's free speech and plaintiff's reputational interest. However, while Dr. Bindrim's reputational interest was at stake, it is not clear that harm can come to a reputation when the novel is predicated on the understanding that this is a work of fiction.[53] Certainly, critics are astute in their concern regarding the durational aspect of the written word.[54] In the sense that the printed and spoken word can never truly be "taken back," some harm to reputation must be conceded. A plaintiff can never be made completely whole from the damage of hurtful words, whether defamatory or not.[55] Indeed, retraction often highlights the controversy over one's reputation, rather than completely exonerating plaintiff and cleansing the harm to plaintiff's reputation.[56] Even if some reputational harm were to result, on balance, the scales must tip in favor of the author's free speech protections and away from this brand of self-censorship advocated by the *Bindrim* decision. Harm to the

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[51] *See infra* Part IV.C. 1 & 2.

[52] *Supra* notes 37–40 and accompanying text.

[53] *Supra* notes 37–40 and accompanying text.

[54] *See generally* Marc A. Franklin, *Fiction, Libel and the First Amendment*, 51 BROOK. L. REV. 269 (1985); Martin Garbus & Richard Kurnit, *Libel Claims Based on Fiction Should Be Lightly Dismissed*, 51 BROOK. L. REV 401 (1985).

[55] Hustler Magazine v. Falwell, 485 U.S. 46, 52 (1988).

[56] *Falwell*, 485 U.S. at 52, ("False statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas, and they cause damage to an individual's reputation that cannot easily be repaired by counter speech, however persuasive or effective.") (quoting Gertz v. Robert Welch, 418 U.S. 323, 340, 344 n.9 (1974); Rosenbloom v Metromedia, Inc., 403 U.S. 29, 46 (1971) ("Denials, restrictions, and corrections are not 'hot' news, and rarely receive the prominence of the original story."). *But see* American Postal Workers Union v. United States Postal Serv., 830 F.2d 294, 307 n.22 (D.C. Cir. 1987) ("Thus, any harm that might be presumed to have resulted from Gordon's statements must equally be presumed to have been largely or wholly dissipated by his retraction.").

reputational interest of the plaintiff is discussed further in the framework of classical malice in Part IV of this Article.

2. *The Disclaimer*

Many authors of fiction clearly mark their work with disclaimers that alert the reader that the work is purely fictional. A legend at the beginning of a book that states: "The characters in this book are fictitious; any resemblance to living persons is purely coincidental," should be enough to immunize the author from liability.[57]

Some commentators and courts disagree with this proposition. One commentator speculates that this phrase is probably meaningless if a real person is intended as a model for the fictional character.[58] In *Corrigan v. Bobbs-Merrill, Co.*, the New York Court of Appeals wrote, "Reputations may not be traduced with impunity, whether under the literary forms of a work of fiction, or in jest."[59]

The purpose of the disclaimer is twofold. The author's concern, of course, is to shield himself or herself from liability.[60] However, he or she is also interested in protecting the identity of his or her characters and helping to control the reader's perception that the story is indeed fictional.[61] Such a disclaimer should function as evidence of the author's intent not to harm plaintiff under the classical malice analysis. While the author's motivation is partly self-interest; it is also to prevent reputational harm from befalling a potential plaintiff.

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[57] For a discussion of disclaimers see David A. Anderson, *Defamation in Fiction: Avoiding Defamation Problems in Fiction*, 51 BROOK. L. REV. 383 (1985); Paul A. LeBel, *Defamation in Fiction: The Infliction of Harm Through the Publication of Fiction: Fashioning a Theory of Liability*, 51 BROOK. L. REV 281 (1985). *See, e.g.*, *Falwell*, 485 U.S. at 48 (containing advertisement disclaimer indicating that it was parody and not to be taken seriously); Geisler v. Petrocelli, 616 F.2d 636, 638 (2d Cir. 1980) (purporting to be work of fiction, a book, on its frontispiece set forth the standard disclaimer of intentional resemblance between its characters or episodes and real persons or actual incidents); Kelly v. Loew's, 76 F. Supp. 473, 480 (D. Mass. 1948) (containing customary legend that "The events, characters, and firms depicted in this photoplay are fictitious. Any similarity to actual persons, living or dead, or to actual firms is purely coincidental.").

[58] PHILLIP WITTENBERG, THE PROTECTION OF LITERARY PROPERTY 216 (1978).

[59] *Corrigan v. Bobbs-Merrill,Co.*,126 N.E. 260, 262 (N.Y. 1920).

[60] *E.g.*, Dworkin v. Hustler Magazine, Inc., 668 F Supp. 1408, 1416 (Cal. Ct. App. 1987) ("Although this type of disclaimer may be seen as highly self-serving, it would put a reasonable reader on notice that the material is, at least, of questionable veracity.").

[61] *Id.*

3. *Promotion of Artistic Expression*

Literature offers Americans the opportunity for culture and escapism. In this era of video games and visual media, it is undesirable to foster a policy that thwarts the creativity of writers of literature. By imposing liability for a failed disguise[62] or coincidental name use,[63] the richness of literature is likely to be overshadowed by self-censorship on behalf of the literary community. After all, if Charles Dickens had feared liability for similarities between his contemporary writers and his characters in *Bleak House*,[64] the world might have been deprived of a classic work of literature. An author must be permitted to draw on real-life experiences in fashioning a believable and entertaining work of fiction.

B. *Fiction is Constitutionally Protected as Opinion*

Some commentators have suggested that fiction should be viewed as purely opinion, thus girding constitutional protection.[65] As the Court stated in *Gertz*, "Under the First Amendment, there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."[66]

While it is clear that a defamatory utterance must be bottomed on fact to be actionable, the task of distinguishing fact from opinion is not always a simple one. There are contexts in which a statement may blend elements of fact and opinion, posing an ambiguity as to the author's intent. An example of ambiguity in the fact/opinion area is the "op-ed" section of a newspaper.[67] The term itself implies a blending of fact and opinion. "Op" implies opinion, while "ed" implies editorial, which is usually based on a blend of facts and

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[62] *Infra* note 114.

[63] *Infra* note 90 and accompanying text.

[64] *See supra* note 45 and accompanying text for an explanation of Charles Dickens's use of real persons, contemporary writers, as models for his characters in *Bleak House*.

[65] Schauer, *supra* note 46, at 260.

[66] Gertz v. Robert Welch, Inc., 418 U.S. 323, 339–40 (1974).

[67] *See, e.g.*, Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984) (disputing contents of op-ed column that quoted an unnamed political scientist as saying, "Ollman has no status within the profession, but is a pure and simple activist."), *cert. denied*, 471 U.S. 1127 (1985), *quoted in* Vincent Brannigan and Bruce Ensor, *Speech and the First Amendment: Did Bose Speak Too Softly? Product Critiques and the First Amendment*, 14 HOFSTRA L. REV. 571, 596 (1986).

editorializing. Courts have struggled to resolve the ambiguities surrounding the fact/opinion area.[68]

Resolving the ambiguities between fact and opinion is equally troublesome for fiction. The author will assert that his or her work is purely opinion and protected free speech. However, earlier discussion has shown that writers often rely on real people and real experiences in crafting their fiction. The genre of faction is, by definition, a blend between fact and fiction.[69] Casting faction as pure opinion would be counterintuitive because there are elements of fact within such a genre. Casting fiction as opinion may be workable in application to pure fiction. However, it fails when applied to faction, which, again, blends elements of fact and opinion. The classification of fiction as opinion would not put the author in any better position than under the *New York Times* standard, because the plaintiff could defeat defendant by presenting enough evidence to show that there were significant elements of fact present in the work of the author. If the plaintiff could convince the jury that a reasonable reader would perceive defendant's work as factual in some aspects, defendant may indeed be left with less protection than he would be afforded under the constitutional malice fault standard in *New York Times*.

Protection of fiction as opinion was invoked as a rationale by the court in *Pring v. Penthouse*.[70] Although the outcome of this case was correct, the court's rationale is not satisfying. In *Pring*, plaintiff sued *Penthouse* magazine

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[68] In *Ollman*, 750 F.2d 970, the court constitutionalized the fact/opinion area, making the issue a question of law for the judge to decide. This case gave absolute privilege for opinion. The court suggested a four-factor test for the judge to consider whether a statement was fact or opinion: (1) the specific language used; (2) whether the statement is verifiable; (3) the general context of the statement; (4) the broader social context in which the statement appeared. *Id.* at 979.

Subsequently, the Supreme Court rejected the *Ollman* test and rejected any constitutional privilege for opinion. In Milkovitch v. News-Herald, 497 U.S. 1 (1990), the Court posed the following inquiry: Is the real import of the utterance capable of being proven true or false? Although the Court announced the test to resolve the ambiguity between fact and opinion, the Court was silent on the issue of whether the judge or jury would resolve the question.

The fact/opinion area has been riddled with controversy and confusion. The current status of law appears to favor the jury in making the determination of fact or opinion based on what a reasonable reader would perceive. *See, e.g.*, Good Gov't Group of Seal Beach, Inc. v. Superior Court, 586 P.2d 572 (Ca. 1978), *cert. denied*, 441 U.S. 961 (1979); *see also* RESTATEMENT (SECOND) OF TORTS § 566 (1989) ("A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is only actionable if it implies the allegation of undisclosed defamatory facts as the basis for the opinion.").

[69] *See supra* note 11 for a definition of faction.

[70] 695 F.2d 438 (10th Cir. 1983).

for defamation. The magazine contained an article that described Miss Wyoming performing bizarre sexual acts with a male companion. The court found that the story was merely an attempt to ridicule the Miss America contest and could not be taken as true.[71] The court noted:

> The First Amendment is not limited to ideas, statements, or positions which are accepted; which are not outrageous; which are decent and popular; which are constructive or have some redeeming element; or which do not deviate from community standards and norms; or which are within prevailing religious or moral standards.[72]

Because no reasonable reader could perceive the *Penthouse* article as truth, the court protected defendant's freedom of speech, despite the repugnance of the article's contents.[73]

In *Pring*, the determination of whether the article was opinion was approached by focusing on the perception of the reader. The court's approach in *Pring* would have been more sound if the court had looked to the intent of the author. The author's use of ridicule or rhetorical hyperbole was not meant to convey truth. The article was merely a brand of black humor. Evaluating an article as opinion subjects the author to the whim of the reader's perception if the article is deemed ambiguous.[74] If ambiguity exists, the jury will probably determine whether a reasonable person would perceive the article as fact or opinion.[75] This result is undesirable. Instead, the level of protection afforded to the article should be determined by looking at the intent of the author, not the perception of the reader. The classical malice standard of fault should have been invoked in this case to shield defendant from liability. This will be discussed in greater detail in Part IV, which considers the propriety of a classical malice standard of fault.

IV. CLASSICAL MALICE AS A MEASURE OF FAULT FOR DEFAMATION IN FICTION

As an alternative to the *New York Times* and *Gertz* fault standards, classical malice is the proper standard to apply to defamation in fiction cases. Classical malice considers the state of mind of the author, rather than the perception of the reader. The focus of a classical malice inquiry rests in an exploration of the

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[71] *Id.*
[72] *Id.* at 443.
[73] *Id.*
[74] *Supra* note 68.
[75] *Supra* note 68.

intention of the author in publishing his work. Did the author harbor ill will or spiteful motivations in his utterance about plaintiff? This test should be employed for all fiction cases, regardless of the genre of fiction at issue. The classical malice standard affords protection to the author's freedom of speech, which permits creative works to flourish and abound without restriction, enabling all of society to enjoy fiction.

A. *The Classical Malice Standard Applies to All Plaintiffs*

The classical malice standard is attractive because it can be uniformly applied to all fiction cases, regardless of the status of the plaintiff. Under the *New York Times* standard, knowledge of falsity or reckless disregard thereof is the standard of fault for plaintiffs who are public officials or public figures.[76] Under *Gertz*, negligence is the fault standard for private plaintiffs in an action that is a matter of public concern.[77] The classical malice standard does not distinguish between public or private plaintiffs. The classical malice standard applies to all plaintiffs, regardless of status.

This application to public and private plaintiffs alike is plausible because the traditional concept of ill will does not discriminate between public or private plaintiffs. If the plaintiff can prove that defendant acted with ill will, there is no other degree of fault required. The *New York Times* actual malice test simply does not provide enough protection to the creative rights of the author.[78] The *Gertz* negligence standard is even less protective of free speech.[79] If an author has acted with ill will, plaintiff should find relief regardless of whether he or she is a private or public figure. Conversely, if the author did not intend any ill will or classical malice, a plaintiff's showing of knowledge of falsity, reckless disregard of falsity, or negligence should not be enough to trigger liability.

B. *Classical Malice Is Appropriate Because Fiction Should Be Granted Greater Protection than Utterances that Purport to Be Factual*

Fiction deserves a higher level of protection because the author of fiction does not hold his or her work out to the public as an assertion of fact. Fiction is designed for the reader as an escape from reality into a world of fantasy The plaintiff in a defamation in fiction case must prove more than knowledge of falsity or reckless disregard thereof.

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[76] *Supra* notes 26, 29 and accompanying text.

[77] *Supra* note 31 and accompanying text.

[78] *See supra* notes 32–33 and accompanying text.

[79] *See supra* notes 32–33 and accompanying text.

There is an inherent paradox in applying the *New York Times* standard to fiction. Because fiction is paradoxically knowledge of falsity, the *New York Times* standard offers no protection for the creator of fiction. Therefore, the higher standard of classical malice must logically apply. As explained earlier, it is unsatisfactory to apply constitutional malice to fiction by classifying fiction as false speech.

C. *Classical Malice Is Applicable To All Genres of Fiction*

The classical malice standard of fault is applicable to all genres of fiction, whether pure fiction, *roman a clef*, faction, or docudrama. Before considering the classical malice standard as applied to each of these types of fiction, an explanation of the "of and concerning" requirement is necessary.

As mentioned in Part II.A, one of the common-law requirements for sustaining a defamation action in nonfiction cases is proof that the defamatory statement is of and concerning the plaintiff.[80] The of and concerning requirement is particularly important in fiction cases because the identification of a real person within a fictional work is often challenging.[81] Because the author presents his work as fiction, there is a presumption that the characters within the fictional work are not real persons and that the work should not be literally interpreted.[82] Proof that the fictional work contains portions of and concerning the plaintiff has been a central dilemma for plaintiffs in defamation in fiction cases.

The *Restatement (Second) of Torts* Section 564 suggests that the of and concerning requirement is measured in terms of the perceptions of a "reasonable reader."[83] Comment d of Section 564 makes specific reference to fictitious characters.[84] Comment d states that:

> A libel may be published of an actual person by a story or essay, novel, play or moving picture that is intended to deal only with fictitious characters if the characters or plot bear such a resemblance to actual

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[80] *Supra* note 16.

[81] In Middlebrooks v. Curtis Publishing Co., 413 F.2d 141 (4th Cir. 1969), plaintiff, Larry Esco Middlebrooks, sued for libel alleging that he was defamed in a magazine story featuring a teenager named "Esco Brooks," who committed a number of thefts. The court of appeals found that the of and concerning requirement had not been satisfied. There were marked dissimilarities between the fictional character in the magazine story and plaintiff, such as differences in ages and employment. *Id.* at 143.

[82] As previously discussed, readers do not bring the same expectations to fiction as they bring to factual works such as newspapers. *See supra* note 49 and accompanying text.

[83] RESTATEMENT (SECOND) OF TORTS § 564 (1989).

[84] *Id.* cmt. d.

> persons or events as to make it reasonable for its readers or audience to understand that a particular character is intended to portray that person. . . . If the work is *reasonably understood* as portraying an actual person, it is *not* decisive that the author or playwright did *not so intend*.[85]

Thus, the *Restatement* supports a reasonable reader test for ascertaining whether the of and concerning requirement has been satisfied. Regardless of the author's intent, under the *Restatement* formulation, the reader's perception is used to determine if the work is of and concerning the plaintiff. A majority of jurisdictions have adopted this reasonable reader test.[86] The problems associated with the of and concerning requirement will now be considered in conjunction with the classical malice fault standard for various genres of fiction.

1. *Pure Fiction*

The term pure fiction is somewhat misleading. As mentioned earlier, it is questionable whether any fiction is truly pure because elements of reality are often synthesized into fictional works.[87] Nonetheless, pure fiction connotes fiction that is capable of successfully suspending a reader's view of reality in favor of an escape to the fictional medium.[88] There exists an implicit understanding between the author and reader that both are engaging in a similar form of escapism. "The more closely that scenes in the work are tied to, or incorporate wholesale, actual people or events, the less likely that the reader will approach the work as something that requires suspension of disbelief."[89] Pure fiction exists when the author succeeds in convincing the reader that the fictional work is a suspension of reality.

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[85] *Id.* (emphasis added).

[86] *See, e.g.*, Whitcomb v. Hearst Corp., 107 N.E.2d 295 (Mass. 1952) (surrounding a mistake in a magazine article as to the identity of an American soldier court-martialed in Germany); Coats v. News Corp., 197 S.W.2d 958 (Mo. 1946) (surrounding a mistaken use of plaintiff's picture in an article about jailbreak by a person with the same name as the plaintiff) *cited in* Silver, *supra* note 11 at 1085 n.76.

[87] *See supra* notes 40–46 and accompanying text.

[88] LeBel, *supra* note 57, at 321–22. Critic Paul A. LeBel analogizes this quality to Samuel A. Coleridge's early nineteenth century notion of "poetic faith." *Id.* at 321 n.162 (citing 7:II SAMUEL T. COLERIDGE, *II Biographia Literaria* 6, *in* THE COLLECTED WORKS OF SAMUEL TAYLOR COLERIDGE 6 (1983)). Coleridge's "willing suspension of disbelief for the moment" is analogous to the concept of pure fiction. *Id.*

[89] LeBel, *supra* note 57, at 322.

a. *Coincidental Use of Real Name*

This section refers to pure fiction in which the author inadvertently uses the plaintiff's name in his work without any knowledge of the existence of the plaintiff.[90] This presents an easy case for absolving the defendant from liability.

First, it seems that the of and concerning requirement would not be satisfied. The author had no intention of writing about the plaintiff. Clearly, in the author's mind, his work was not of and concerning the plaintiff. The coincidental use of the plaintiff's name was not intended to refer to plaintiff. Under the *Restatement* formulation, however, this is not the result.[91] The *Restatement* test concerns the perceptions of the reasonable reader.[92] Thus, if a reasonable reader could see a resemblance of the fictional character and plaintiff, the plaintiff would fulfill the of and concerning requirement even though use of plaintiff's name was merely a coincidence.

Notwithstanding satisfaction of the of and concerning requirement, the classical malice standard of fault would shield defendant from liability in the case of the coincidental use of a real person's name. Because there was no spite or ill will on behalf of defendant, plaintiff would fail to meet the burden of clear and convincing evidence of fault. Clearly, the defendant could not intend harm to a plaintiff whom he did not even know.

The scenario of coincidental use of a real name is exemplified in the case of *Clare v. Farrell*.[93] In *Clare*, plaintiff sued for defamation when his name appeared as the title of a novel.[94] The plaintiff's name was the same as that of the main character, an aspiring young writer with what the court described as a "sordid life."[95] The court held that plaintiff had no cause of action because defendant had never heard of the plaintiff, nor had any intent to write his novel about the plaintiff.[96] The of and concerning test in Minnesota focused on the intent of the author,[97] as well as the perception of the reasonable reader.[98]

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[90] Commentators have referred to this scenario as "the accidental description." *See* Mark A. Franklin & Robert Trager, *Literature and Libel*, 4 COMM./ENT. L.J. 205, 229 (1981-82).

[91] *See supra* notes 83-86 and accompanying text.

[92] *See supra* notes 83-86 and accompanying text.

[93] 70 F. Supp. 276 (D. Minn. 1947).

[94] *Id.* at 277.

[95] *Id.*

[96] *Id.* at 277-78.

[97] The court in *Clare v. Farrell* stated that the Minnesota cases on libel seem to test "first, whether the author of the defamatory article intended to write of and concerning the plaintiff, and second, whether it was so understood by those who read the article or by those who knew of its contents." *Clare*, 70 F. Supp. at 278.

Under this formulation, the court found that the writing was not of and concerning the plaintiff.

The result in *Clare* is correct regarding the of and concerning requirement. Furthermore, had the classical malice fault standard been utilized, it would have been impossible to assert fault on behalf of the defendant because he did not even know the plaintiff. It is clear that defendant could not intend ill will or harm to an unknown plaintiff. Thus, applying the classical malice standard to the facts of *Clare* would yield the same results in favor of defendant.

Commentators have suggested that an author who coincidentally uses the name of a real person may be liable under a negligence theory.[99] A negligence standard of fault is not appropriate in this case. The author who does not intend to depict a real person, and who coincidentally and unfortunately uses the name of a real person, should not encounter any liability unless there was ill will involved.[100]

b. *The "Forgotten Plaintiff"*[101]

This category refers to a plaintiff once known to the defendant, whom the defendant has since forgotten. This, too, presents a case of nonliability for the defendant provided that the defendant did not intend ill will toward plaintiff.

Critics Franklin and Trager suggest a duty on behalf of the author to reasonably remember past acquaintances if the plaintiff and defendant once

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[98] *See supra* notes 83–86 and accompanying text for a discussion of the test outlined in the *Restatement.*

[99] Critics Franklin and Trager advocate judicially-declared duties under this scenario. They give the following example: "[I]f the author places a character in a particular city and draws that character in a defamatory way, it is not unduly inhibiting to require a search of that community's telephone book to determine if someone by that name is listed." Franklin & Trager, *supra* note 90, at 230.

[100] Only one case has been found that imposes liability on the author in the scenario of coincidental use of a real name. This was the English case of E. Hulton Co. v. Jones, [1909] 26 T.L.R. 128 (Eng. C.A.), which permitted plaintiff, Artemus Jones, to sue a publisher who had used his same name in a fictional context. The *Hulton* decision turned on the reasonable reader's understanding of the author's intent. *Id.* at 129. This case highlights the merits of examining the intent of the author as opposed to the perceptions of the reader in determining if the of and concerning requirement has been satisfied. The outcome of this case raises the question of how many Artemus Joneses can sue the publisher? *See* Silver, *supra* note 11, at 1078. If the classical malice standard had been applied, the defendant would not have been held liable because defendant had no intent to harm plaintiff.

[101] This term was used by critics Franklin and Trager. They explained this scenario as follows: "The claim is not that a disguise failed—the author did not realize that a disguise was necessary." Franklin & Trager, *supra* note 90, at 227–28.

knew each other well.[102] They advocate a negligence standard of fault, stating that such a burden is not too onerous for the author.[103] This may be true. Nonetheless, an author should not be required to scour his memory to eviscerate all possible resemblances between his fictional characters and real persons. Regardless of the burden to the author, such an exercise is unnecessary. The analysis must be made in terms of the intent of the author, and forgetfulness certainly exculpates the author from liability under the classical malice standard of fault. It is impossible for a forgetful author to harbor ill will toward a forgotten person.

Evidence of a once-close relationship between plaintiff and defendant could, at best, prove useful as a factor in establishing classical malice. If plaintiff could show that there was a close relationship between plaintiff and defendant, as well as show that defendant's acquaintance with plaintiff was fairly recent, this might be used to prove an intent to harm plaintiff. Absent proof of classical malice, however, no liability should result for defendant.

The case of *Geisler v. Petrocelli*[104] sketches the forgotten plaintiff scenario. Appellant, Melanie Geisler, and appellee author worked together in a small office of approximately twenty people for a period of nearly six months. Subsequent to his departure from that employment, appellee wrote a book in which the central character, named Melanie Geisler, bore a striking resemblance in physical characteristics and personality to appellant. The contents of the book were defamatory in nature.[105] The court refused appellee's motion to dismiss and remanded the case.[106] The court did not decide the issue of the of and concerning requirement.[107]

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[102] *Id.* at 228-29.

[103] *Id.* Franklin and Trager acknowledge that no matter how gross the case, forgetfulness should invoke the *Gertz* negligence standard. *Id.*

[104] 616 F.2d 636 (2d Cir. 1980).

[105] *Id.* The book initially portrayed the character of Geisler as innocent and naive. However, during the course of the narrative, she is induced to participate in tennis fraud and untoward sexual conduct that is graphically portrayed. *Id.* at 637.

[106] *Id.* at 639.

[107] *Id.* The court could have disposed of the case on the of and concerning issue had it followed the approach of the court in Smith v. Huntington Publishing Co., 410 F Supp. 1270 (S.D. Ohio 1975), *aff'd*, 535 F.2d 1255 (6th Cir. 1976). The facts of *Smith* are similar to those in *Geisler*. A newspaper printed a story about the effects of a child's drug use on the family unit. The fictitious names of Mrs. Smith and Randy Smith were used. The real Mrs. Smith, mother of plaintiff, was one of the speakers who was prominent at a meeting attended by the reporter. There was no controversy that the reporter did not actually know that the speakers included Mrs. Smith and that his newspaper had printed some news on the real Randy some months before. *Id.* at 1272. The court held that the coincidental use of plaintiff's name in a newspaper story was insufficient to uphold a libel action. *Id.* at 1274.

The court should have applied a classical malice standard, thus sustaining appellee's motion to dismiss. The author intended the work as pure fiction. He included a disclaimer at the introduction of his book that denied any resemblance between his characters and episodes and real persons or actual incidents.[108] If Geisler truly was "forgotten," as the author asserts, there can be no hook upon which to hang proof of fault under the classical malice standard. There was no intent on behalf of the author to harm appellant, because he had forgotten her very existence. The question of whether he actually had forgotten Geisler is important in establishing the intent of the author. If the author's defense was untrue and he had indeed remembered appellant, this can be used as a factor in considering evidence of the author's ill will or spite toward appellant. Otherwise, no liability should result. Applying a negligence standard in the case of the forgotten plaintiff is as equally unattractive as applying such a standard in the scenario of the coincidental use of a real name.

2. *Roman A Clef*

The *roman a clef* genre presents much closer cases regarding defendant's liability. The gap between fact and fiction is narrower under the *roman a clef* than under the pure fiction cases. The term *roman a clef* refers to a novel that "represents historical events and characters under the guise of fiction."[109] This representation of historical events and characters under the umbrella of fiction presents an inherent difficulty in separating the factual portions of the novel from the fictional portions. The author of the *roman a clef* models his characters after real persons, but protects their identities by giving the characters fictitious names.[110]

The facts of *Kelly v. Loew's, Inc.*[111] illustrate the *roman a clef* genre. Plaintiff, Robert Kelly, a commander in the United States Navy, brought suit for defamation based on the "thinly disguised" portrayal of him in the motion picture *They Were Expendable*. Plaintiff alleged that defendant's portrayal of him as "Rusty Ryan" showed him engaging in conduct unbecoming of an officer and a gentleman. The book, upon which the motion picture was based,

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The court's rationale was that no reasonable person could have believed that the article pointed to plaintiff in light of a clear statement by reporter in boldface print that the names were fictitious. The court observed that this was a "remarkable set of facts," yet still found in defendant's favor. *Id.* at 1272.

[108] *Geisler*, 616 F.2d at 637; *see supra* Part III.A.2 on disclaimers.

[109] *Supra* note 12.

[110] *Supra* note 12.

[111] 76 F. Supp. 473 (D. Mass. 1948).

purported to be and in fact, was a substantially accurate report of historical events regarding the way news of the Pearl Harbor disaster reached the United States Naval Base at Cavite in the Philippines.[112] Plaintiff recovered damages for defamation.[113]

Liability of the author of *roman a clef* should, as in the case of pure fiction, be determined using the classical malice fault standard. Unless the author intended ill will toward the plaintiff, he should not be liable for defamation. The question of liability is hinged on whether the depiction of the fictional character is a "failed disguise"[114] or whether the author's use of the fictional name is merely a "sham" case.[115] If the author created a fictitious name to shield the true identity of his or her character and to prevent harm to plaintiff, then no liability will attach under the classical malice standard.[116] If, however, the author's intent was to inflict harm on plaintiff and intentionally make his true identity known to the reader, the use of a fictitious name will not shield the author from liability.[117]

This classical malice approach is particularly suited to the *roman a clef* scenario. When the author makes an effort to disguise the real person, this is evidence that the author did not intend ill will to the individual. If a reader should perceive the character as resembling the real person, the author who has made a valid effort at disguising the real person should not be held liable.[118]

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[112] *Id.* at 477.

[113] The *Kelly* court acknowledged that in the broadest way, plaintiff was depicted as a "gallant officer." *Id.* at 481. However, within the tradition of the professional class of naval officers, the depiction makes plaintiff appear as "an undisciplined man" who does not measure up to the "'regulation' model of a good officer." *Id.*

[114] Critics Franklin and Trager characterize the failed disguise case as that in which the "author [has] consciously patterned the fictional character on a real person, but intended to disguise that person so plaintiff would not be able to show with clear and convincing evidence that reasonable readers understood the fictional character to be him." Franklin & Trager, *supra* note 90, at 224–25.

[115] Critics Franklin and Trager define the sham case as one in which the "author's real purpose was to veil an attack on plaintiff." Franklin & Trager, *supra* note 90, at 223. The focus is the author's "deliberate [intent] that readers take one of his 'fictional' characters as the plaintiff." *Id.*

[116] *Supra* note 114.

[117] *Supra* note 115.

[118] Most courts have recognized the right to sue for defamation when the reasonable reader has perceived the character to resemble a real person. *See, e.g.*, Yousoupoff v. MGM Pictures, Ltd., [1934] 50 T.L.R. 581 (Eng. C.A.). In *Yousoupoff*, the "real" Princess Natasha successfully sustained a libel action based upon her depiction as either a rape or seduction victim of the famous Rasputin prior to the Russian Revolution. The court held that a publisher could be held liable if a reasonable person could interpret the libel as relating to plaintiff. *Id.*

However, protecting the author's interest is contingent on absence of classical malice. Thus, the failed disguise will be protected while the sham case will not.

This outcome is largely a policy decision. In the failed disguise scenario, the plaintiff has suffered some reputational harm. Because a reader has recognized the fictitious character as plaintiff, plaintiff's reputation has been exposed to the reader's scrutiny. Thus, there is no doubt that reputational harm has resulted. Nonetheless, when there is a tension between the author's free speech and the reputational interest of the plaintiff, the author's interest must prevail. The reader's perceptions must not affect the author's liability.[119] Similarly, disclaimers are evidence of the author's intent to protect plaintiff's identity.[120] Finally, artistic expression must be promoted.[121]

3. *Faction*

Faction[122] draws even more intensely upon reality than the *roman a clef* because faction uses real names and the persons they represent to depict specific conduct.[123] Faction is an amalgamation of fact and fiction, but the format creates what one critic has called "the verbal equivalent of an optical illusion"[124] which makes it somewhat apparent to the reader that the work is an exaggeration based on a real person. Because the author of faction has used the plaintiff's real name in his or her work, the author cannot assert a disguise defense as evidence of lack of intent to harm plaintiff. However, the intent of the author should still be scrutinized under the classical malice standard for factionalization.

In the faction genre, the of and concerning requirement is not at issue. Clearly, when an author uses the name of a famous person and creates a story from actions of that real person, there is no question that the factionalization is of and concerning the plaintiff. The issue in faction becomes one of protection of plaintiff's reputation. As mentioned earlier, when a reasonable reader can connect a fictional character to a real person, some reputational harm must be acknowledged when a defamatory utterance exists.[125] Nonetheless, the First Amendment interest of the author must prevail at the expense of some harm to

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[119] *See supra* Part III.A.1.

[120] *See supra* Part III.A.2.

[121] *See supra* Part III.A.3.

[122] For a definition of faction, see *supra* note 11.

[123] Silver, *supra* note 11, at 1080.

[124] Silver, *supra* note 11, at 1083.

[125] *See supra* Part III.A.

plaintiff's reputation.[126] In the absence of ill will or spite on behalf of the defendant, the author's creative freedom must be protected.

An example of faction is the novel, *The Public Burning*, by Robert Coover.[127] In this novel, Coover tells the story through two narrators, one of whom is identified as Richard Nixon. The novel discusses the trial of Julius and Ethel Rosenburg and purports to present factual aspects of this event. The novel also contains portions that are fictionalized, such as Richard Nixon's involvement in a bungled would-be seduction of Ethel Rosenburg. In addition, the novel portrays political figures such as Assistant Prosecutor Roy Cohn and Judge Irving Kaufman. *The Public Burning* was never the source of a libel action. However, this genre presents an argument for a defamation cause of action because Richard Nixon might argue that he suffered reputational harm as a result of this novel.

Nixon's claim would fail under the classical malice standard of fault. The author's ability to create must be safeguarded provided that he or she intended no harm to plaintiff. Under the *New York Times* standard, the plaintiff's interest might prevail over the writer's interest. Plaintiff might successfully prove knowledge of falsity or reckless disregard thereof because defendant used the names of real persons and fictionalized some of the events within the novel. Such a result would thwart the First Amendment safeguards for freedom of expression. Although fact and fiction become even less separable in faction because of the use of real persons and their real names, the classical malice standard must still be applied to safeguard the First Amendment rights of the author and protect the reputational interests of the plaintiff when the author has acted with ill will.

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[126] *See supra* Part III.A.

[127] ROBERT COOVER, THE PUBLIC BURNING (1976). This novel is discussed by Franklin and Trager, *supra* note 90, at 231, and Silver, *supra* note 11, at 1067–68. Other examples of faction include E.L. DOCTOROW, RAGTIME (1st Ballantine Books ed. 1987) (1975) and PHILIP ROTH, OUR GANG (1971) *cited in* Silver, *supra* note 11, at 1068. Street v. National Broadcasting Co., 645 F.2d 1227 (6th Cir. 1981), illustrates the issues arising from faction. In *Street*, plaintiff, Victoria Price Street, sued for defamation based on how the defendant depicted her in a televised historical drama called *Judge Horton and the Scottsboro Boys*. The drama was based on historical events and plaintiff's real name was used. Street was portrayed in a derogatory light as a woman attempting to send nine innocent black males to the electric chair for a rape they did not commit. The court applied a constitutional malice standard in this case and found that there was no evidence of malice in this publication. *Id.*

4. *Docudrama*

The final genre to consider is that of the docudrama.[128] Docudramatization consists of adding fictional dialogue to a biographical treatment of a celebrity's life story.[129] Most of the cases that have arisen as the result of docudramas involve right of publicity causes of action;[130] they are not defamation cases. However, docudrama is an area that could present problems in the defamation context. The issue that arises in the context of docudramas is the limitation of the author's right to add fictional dialogue to a real life story While there is some fidelity to fact, the dialogue used to express the true story is fictionalized. As a blend of fact and fiction, docudramas present the same problems in the context of defamation as factionalization or the *roman a clef.*

Docudramas should be protected under the First Amendment through the classical malice approach. Although the creator is attempting to convey real life events, he or she is doing so in an artistic medium. A docudrama "partakes of author's license—it is a creative interpretation of reality."[131] In *Davis v. Costa-Gavras,*[132] the court applied the *New York Times* standard to decide that no cause of action could be sustained against the creator of a docudrama.[133] The

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[128] Made-for-television movies are the best examples of docudramas. *The Amy Fisher Story* chronicled the drama of the "Long Island Lolita," her alleged affair with Joey Buttafuoco, and the attempted murder of Mrs. Buttafuoco. Jon Lafayette, *Courting Viewers; TV Plays for Ratings with High-Profile Trials,* ELECTRONIC MEDIA, Feb. 8, 1993, at 1. The decade-long battle between Auschwitz survivor, Mel Mermelstein and revisionist historians who questioned the fate of Jews during World War II was the subject of the made-for-television docudrama, *Never Forget.* Mark I. Pinsky, *Doubters of the Holocaust Win a Round in Court,* LOS ANGELES TIMES, Sept. 25, 1991, at B9. *The Texas Cheerleader Murder Plot* is the made-for-cable movie about Wanda Holloway's attempted murder of Verna Heath, the mother of a 13 year-old girl who was perceived by Holloway as her daughter's chief rival for a high school cheerleading spot. Tom Curtis, *2, 4, 6, 8, Movie Rights, Negotiate! Cheerleader Case Figures Are Wheeling & Dealing,* WASH. POST, Sept. 9, 1991, at B1.

[129] Lisa A. Lawrence, *Television Docudramas and the Right of Publicity: Too Bad Liz, That's Show Biz,* 8 COMM./ENT. L.J. 257, 279 (1986). For a more comprehensive definition of docudrama and its relationship to the documentary, see *supra* note 13 and accompanying text.

[130] The right of publicity is the right of a person to "own, protect, and commercially exploit his own name, likeness, and persona." Deborah Manson, *The Television Docudrama and the Right of Publicity,* COMM. & LAW, Feb. 1985, at 41, 44.

[131] Davis v. Costa-Gavras, 654 F. Supp. 653, 657 (S.D.N.Y. 1987).

[132] 654 F. Supp. 653.

[133] *Id.* In *Davis,* plaintiff brought a defamation suit based on defendant's portrayal of him in the docudrama, *Missing.* Plaintiff, the Commander of the United States Military Group, complained that defendants acted with constitutional malice when they portrayed

court found that defendant had not acted with knowledge of falsity or reckless disregard thereof. This is a suitable result. However, application of a classical malice standard would have gone even further to protect the author. The court noted that dramatic embellishments in the docudrama did not distort the fundamental story being told.[134] So long as the author's embellishments are not intended to harm plaintiff, the film creator should be insulated from liability.

The *Davis* court framed the defamation issue in terms of the quantum of fictionalization. The court stated that "the First Amendment . . . does not demand literal truth in every episode depicted."[135] However, the *Davis* court did place emphasis on the fact that the author had only indulged in "minor" fictionalization.[136] This leaves open the possibility that the author could be subject to liability under the constitutional malice fault standard if he or she crosses this threshold of minor fictionalization. When has the author strayed far enough from minor fictionalization to give the plaintiff clear and convincing evidence of constitutional malice?

Instead, analysis should focus on the intent of the author. If an author indulges in "major" fictionalization, this is acceptable under the classical malice standard of fault so long as there is no ill will on behalf of the author. The same result is not clear under the *Davis* approach. Setting boundaries and parameters around an author's creativity is likely to produce ill effects in light of the First Amendment rights of the author.

V. CONCLUSION

Defamation in fiction is a unique brand of speech that must be approached differently than defamation in other contexts, such as political advertisements or newspaper articles. Because the very nature of fiction involves creating an imaginary world of falsity, the *New York Times* test of knowledge of falsity or reckless disregard thereof is an inadequate test when applied to fiction. In addition, the treatment of fiction as opinion is unsatisfactory because this approach focuses on the perceptions of a reasonable reader, rather than the intent of the author. To afford the author greater protection under the First Amendment, the intent of the author must be examined under the classical malice fault standard to determine liability for defamation in fiction cases.

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him. In the film, the character representing plaintiff ordered or approved a Chilean order to kill Charles Horman, an American residing in Chile. *Id.*

[134] *Id.* at 657.

[135] *Id.* at 658.

[136] *Id.* (stating that, [i]n docudrama, *minor* fictionalization cannot be considered evidence or support for the requirement of actual malice") (emphasis added).

Indeed, a modicum of reputational harm may result when a plaintiff is portrayed in a fictional medium. Nonetheless, policy must prefer a protection of the author's freedom of speech at the expense of some reputational harm to the plaintiff when these competing interests collide. Unless an author acted with spite or ill will, his or her interests must be safeguarded, although such protection may result in some reputational harm to the plaintiff.